

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN TIPSWORD,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 237811

Livingston Circuit Court

LC No. 01-012078-FH

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating under the influence of liquor/unlawful blood alcohol content (OUIL/UBAL), third offense, MCL 257.625, and driving while license suspended, MCL 257.904. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 3 to 7 ½ years' imprisonment. Defendant appeals as of right. We affirm.

Sometime in the early morning of December 16, 2000, a Michigan Department of Transportation (MDOT) worker, who was clearing snow from the roadway, witnessed a pickup truck stuck in the snow in a ditch near the exit ramp of the freeway. According to the witness, he had not seen the truck in the ditch when he plowed the ramp five to fifteen minutes prior to that time. At the time he noticed the truck, the witness saw a gentleman, who he identified as defendant, sitting in the driver's seat of the truck. Defendant offered the witness fifty dollars to pull the truck out of the snow, but the witness declined. The witness then left and called 911 to report the incident. A short while later, the witness saw defendant at a nearby Speedway gas station.

Troopers David Clark and Ernest Felkers of the Michigan State Police responded to the call and found the pickup truck stuck in the snow off the road and one set of footprints coming from the driver's side of the truck. They then received information that the driver was at the Speedway station and proceeded to the gas station to locate the driver. From information received at the Speedway station, the officers proceeded to a Mobil gas station across the street where they found defendant. When Trooper Clark asked defendant if the pickup truck in the

ditch was his, he denied it and also denied being the driver of the truck.<sup>1</sup> Trooper Clark then asked defendant to walk back to the truck with him and defendant complied.

At the scene, Trooper Clark matched the treads on defendant's shoes to the footprints in the snow leading away from the driver's side of the truck. Through dispatch, Trooper Clark requested that the MDOT worker return to the scene. The witness returned and identified defendant as the man he saw behind the wheel of the truck. The officers requested defendant perform a field sobriety test but defendant refused. Because Trooper Clark noticed a strong smell of intoxicants on defendant and that defendant had bloodshot eyes and slurred speech, he arrested defendant for OUIL. After arresting defendant, Trooper Clark found the keys to the truck in defendant's coat pocket. Trooper Clark obtained a search warrant for defendant's blood, and chemical tests showed defendant had a blood alcohol level of .19 grams.<sup>2</sup>

Both defendant and his wife, Mrs. Tipsword, testified at trial that defendant was not the driver of the truck. According to their testimony, defendant had been drinking at the bar and Mrs. Tipsword picked him up and their truck got stuck in the snow.<sup>3</sup> Mrs. Tipsword left to get help and defendant remained with the truck. Both defendant and Mrs. Tipsword testified that Mrs. Tipsword arrived back at the scene with another gentleman, but the officers told them to leave.

Defendant first argues the prosecution failed to present sufficient evidence that defendant was operating the vehicle to support the OUIL conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Under MCL 257.625, the prosecutor must prove (1) the defendant was operating a motor vehicle on a highway or other place open to the general public, and (2) the defendant operated the motor vehicle under the influence of intoxicating liquor or with a blood alcohol content of .10% or more. Operating a vehicle under the influence of alcohol means that as a result of

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<sup>1</sup> Apparently defendant told Trooper Clark that he had been dropped off at the gas station by a friend.

<sup>2</sup> Testimony also revealed that another vehicle stopped at the scene while defendant was being arrested, but the officers told the individuals to move on.

<sup>3</sup> Defendant also produced another witness who claimed to have been at the bar with defendant on the night in question and recalled that Mrs. Tipsword picked defendant up from the bar.

consuming alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. CJI2d 15.2; CJI2d 15.3.

Defendant argues only that there was insufficient evidence that he operated the vehicle in question. Although no witness actually saw defendant drive the truck, circumstantial evidence, and the reasonable inferences drawn therefrom, indicated defendant was the driver. The MDOT worker did not see the truck at the time he plowed the ramp, however sometime between five and fifteen minutes later, he found the truck stuck in the ditch. The witness observed defendant sitting behind the wheel of the truck. The officers found one set of footprints coming from the driver's side of the truck and determined that the footprints matched the tread of defendant's shoes. Also, the keys for the truck were found in defendant's pocket.

Although defendant and Mrs. Tipsword both testified that it was Mrs. Tipsword who drove the truck, credibility determinations are for the jury. *Wolfe, supra*. Viewing the evidence in the light most favorable to the prosecution, as we must do, there was sufficient evidence presented for the jury to find that defendant operated the vehicle in question.

Defendant also argues that his warrantless arrest was improper. Generally, a police officer cannot arrest an individual for a misdemeanor if the offense was not committed in the officer's presence. However, an officer can arrest a person without a warrant if he has reasonable cause to believe that the person was, at the time of an accident, the driver of a vehicle involved in the accident and was operating the vehicle on a public highway or other place open to the general public, in the state while under the influence of intoxicating liquor. *People v Lyon*, 227 Mich App 599, 605; 577 NW2d 124 (1998). In determining whether an accident has occurred, relevant factors include whether there was a collision, whether personal injury or property damage resulted from the occurrence, and whether the incident either was undesirable for or unexpected by any of the parties directly involved. *Id.*, quoting *People v Keskimaki*, 446 Mich 240, 255-256; 521 NW2d 241 (1994). Although the question whether an event is "unexpected" is not dispositive, the determination whether an accident has occurred depends on an examination of all the circumstances surrounding the incident. *Keskimaki, supra* at 255.

We note that defendant did not raise this issue at trial. Before trial, defendant requested an evidentiary hearing to determine whether the identification of defendant at the scene was proper. The trial court was not presented with and did not decide whether defendant's arrest was proper.<sup>4</sup> Although defendant raised this issue in his post-trial motion for JNOV and new trial, the trial court denied the motion without specifically addressing whether defendant's arrest was proper. Because this issue was not properly raised before and addressed by the trial court, it was not properly preserved and we need not address it. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). However, we will review this issue for plain error. See *Carines, supra* at 763.

Defendant's vehicle was found stuck in the snow in a ditch near the exit ramp of a freeway. Although there is no evidence of personal injury or property damage that resulted from the occurrence, it can be inferred that the vehicle was rendered inoperable for the amount of time

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<sup>4</sup> Defendant does not appeal the trial court's determination that the identification was proper.

it was in the ditch. It is clear that the incident was undesirable for or unexpected by defendant. In fact, defendant offered the MDOT worker \$50 to pull the truck from the ditch. Under the circumstances, the incident constituted an accident; therefore, defendant's arrest was proper.

Even if we were to conclude that the incident did not constitute an accident and that defendant's arrest was not statutorily valid, this would not inevitably lead to the suppression of evidence gained after the arrest. See *Lyon, supra* at 610-611. The exclusionary rule applies only if the seizure was constitutionally invalid. *Id.* The constitutional validity of an arrest depends on whether there was probable cause to arrest. *Id.* at 611. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *Id.*, citing *Illinois v Gates*, 462 US 213, 243 n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

In this case, the facts support a finding that probable cause existed to arrest defendant. The arresting officer smelled alcohol on defendant and noted that defendant had bloodshot eyes and slurred speech. The MDOT worker identified defendant as the individual he saw sitting behind the wheel of the truck. Given the location of the vehicle, the testimony of the witness, and the condition of defendant when viewed by the arresting officer, there was probable cause to arrest defendant for the offense of OUIL. Because defendant's arrest was constitutionally valid, even if we had found it was not statutorily valid, the exclusionary rule would not apply. See *Lyon, supra* at 612.<sup>5</sup>

Defendant also argues, albeit rather confusingly, that the arresting officer engaged in an illegal investigatory stop. Essentially, he argues that the officers engaged in an illegal *Terry* stop.<sup>6</sup> Again, defendant did not raise this issue at trial, but only briefly mentioned it during his post-trial motion. However, the trial court did not specifically address this issue when it decided the post-trial motion. Under the circumstances, this issue was not properly preserved, however, we will address this issue for plain error. See *Carines, supra*.

Defendant contends that while at the Mobil gas station, he was illegally detained and questioned for the purpose of investigation. Defendant relies on Trooper Clark's testimony during which he recalled that defendant was not free to leave during the investigation. However, at trial, Trooper Clark testified that he asked defendant and defendant agreed to walk back to the truck with him. Defendant testified that he walked back to the truck with the officer. There is no evidence that defendant was handcuffed or being restrained. Voluntary requests do not constitute a search or seizure. See *People v Shankle*, 227 Mich App 690, 696-697; 577 NW2d 471 (1998). Moreover, a police officer's subjective intent does not determine whether a person has been arrested. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Under the circumstances, there is no evidence that defendant was illegally detained.<sup>7</sup>

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<sup>5</sup> On appeal, the prosecution argues that defendant's arrest was valid under MCL 764.15(1)(d). The trial court did not address this issue; however, because we have already found the arrest to be constitutionally valid, we need not explicitly address this provision of the statute.

<sup>6</sup> *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

<sup>7</sup> Regardless, under the circumstances, based on the evidence presented – the position of the vehicle in the ditch and the fact that a witness saw defendant behind the wheel of the vehicle  
(continued...)

Affirmed.

/s/ Richard A. Bandstra  
/s/ Hilda R. Gage  
/s/ Bill Schuette

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(...continued)

– the officer had a reasonable and articulable suspicion that defendant had committed an OUIL, thus justifying a brief investigatory detention. See *People v Oliver*, 464 Mich 184, 192-193; 627 NW2d 297 (2001).